

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

v.

EWELL L. SPRADLIN COAL CO.

IBLA 85-407

Decided September 17, 1986

Appeal from a decision of Administrative Law Judge David Torbett vacating Notice of Violation No. 83-9-19-3. NX 3-20-R.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Notice of Violation: Specificity

A notice of violation issued pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), which does not set forth with reasonable specificity the nature of the alleged violation is properly vacated.

APPEARANCES: Paul A. Molinar, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Charles A. Wagner III, Esq., Knoxville, Tennessee, for the Ewell L. Spradlin Coal Company.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a decision of Administrative Law Judge David Torbett, dated January 15, 1985, vacating Notice of Violation (NOV) No. 83-9-19-3 issued by OSM on August 19, 1983, as modified on October 3, 1983, to the Ewell L. Spradlin Coal Company (ELS). On September 12, 1983, ELS filed an application for review of and temporary relief from NOV No. 83-9-19-3, pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275 (1982). A hearing was held before Judge Torbett on October 27, 1983, in Knoxville, Tennessee.

The facts of this case are undisputed. ELS operates a coal facility, known as Tipple No. 1, in Campbell County, Tennessee, on the east and west sides of Highway 25W, in part under National Pollutant Discharge Elimination System (NPDES) permit TN 0029629. On May 24, 1983, OSM inspector Glenn C. Sanders and State inspector Bonnie Armstrong inspected ELS's facility, noting

that the area east of Highway 25W was being actively used. On May 25, 1983, OSM inspector Sanders issued a 10-day notice to the State Division of Surface Mining and Reclamation (DSM), stating in part that OSM had reason to believe that ELS was violating its "NPDES permit" by "[f]ailing to reclaim the area east of highway 25W" (Exh. R-4). On June 10, 1983, DSM issued NOV No. 069-30-83 to ELS for failure to follow its approved NPDES permit in accordance with Tennessee regulation 0400-1-2-.23, with respect to the area east of Highway 25W. DSM required ELS to decommission and reclaim the area by July 11, 1983. See Exh. R-13. On July 26, 1983, DSM terminated NOV No. 069-30-83 because ELS had "submitted plans to permit the portion of the area the NOV applies to" 1/ (Exh. R-7).

On August 19, 1983, OSM inspector Sanders issued NOV No. 83-9-19-3 because ELS had "disturbed an area outside the approved NPDES permit area," in violation of section 502 of SMCRA, 30 U.S.C. § 1252 (1982), and Tennessee regulation "0400-1-21-.02(1)" (Exh. R-10). The OSM inspector required ELS to reclaim the disturbed area or "secure and implement [an] approved plan" by October 3, 1983. Id. On October 3, 1983, the OSM inspector modified the NOV to extend the time for abatement to November 29, 1983, in order to permit ELS to secure approval of an amendment of the NPDES permit. See Exh. R-11. The OSM inspector also required ELS to immediately cease all activities in the area, "except those activities essential to the reclamation of the area." Id.

In its application for review, ELS contended that OSM's NOV should be vacated, and asserted, inter alia, that (1) the off-site tippie area was not subject to regulation under SMCRA or the State surface mining act; (2) the State had taken appropriate action under section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982); (3) compliance was not achieved with section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982); (4) the NOV was defective and did not meet the requirements of section 521(a)(5) of SMCRA, 30 U.S.C. § 1271(a)(5) (1982); and (5) corrective action had been completed at the time the NOV issued.

In his January 1985 decision, Judge Torbett, noting that he was unsure whether ELS was required to have a "surface mining permit" for the off-site tippie area, but that ELS was required to have a NPDES permit, vacated OSM's NOV. Judge Torbett stated the issue was whether ELS could continue to operate in that area pending approval of its NPDES permit amendment or would be required to "dismantle" its operation and reclaim the area. Judge Torbett held in favor of allowing ELS to continue its operations. Judge Torbett based his conclusion on his "experience" that OSM had allowed mining operations to continue "without proper permits while these permits were obtained" and the absence of any evidence to support requiring ELS to cease operations,

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1/ In its application for review, ELS explained it had filed an amendment to its NPDES permit with DSM on July 18, 1983, incorporating the area east of Highway 25W, a draft permit had been issued on August 24, 1983, and the review process was "currently being completed."

especially where "no environmental harm would result." 2/ Judge Torbett stated that OSM's decision to require ELS to cease its operations in the off-site tippie area was unsupported and "totally arbitrary."

In its statement of reasons for appeal, OSM contends the NOV was properly issued because the off-site tippie area was not "under permit" as required by "Tennessee Division of Surface Mining Regulation 0400-1-21-.02" and OSM had merely required ELS to comply with its existing NPDES permit by ceasing operations and reclaiming the area east of Highway 25W. OSM argues there was no evidence introduced at the hearing that it had allowed mining operations to continue without proper permits and that Judge Torbett could not rely on his personal knowledge, citing Capital Coal Corp., 4 IBSMA 179 (1982). OSM states it does not have any discretion "relative to enforcement of permitting requirements."

In its reply brief, ELS contends that OSM's NOV for conducting operations without a NPDES permit was improperly issued because neither section 502 of SMCRA, nor the Tennessee regulation cited in the NOV require a NPDES permit. 3/ ELS concludes that the NOV "does not state a violation" and was therefore properly vacated. ELS also argues that, with respect to a violation of the NPDES permit, the State had taken appropriate action under section 521(a)(1) of SMCRA, to remedy that violation.

[1] At the time OSM issued the NOV at issue, the State of Tennessee was operating under a permanent regulatory program adopted by the State for surface coal mining operations which had been conditionally approved by the Department of the Interior effective August 10, 1982, pursuant to section 503 of SMCRA, 30 U.S.C. § 1253 (1982). See 47 FR 34724, 34753 (Aug. 10, 1982). Accordingly, DSM was the primary regulatory authority for enforcement of the

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2/ Judge Torbett held that the anticipated lack of environmental harm was supported "by a preponderance of the proof," referring in part to testimony that "all environmental controls were in place."

3/ ELS points out that the NOV did not cite ELS for operating without a surface mining permit, i.e., a "DSM permit." ELS cites the following colloquy between the OSM inspector and ELS's attorney:

"Q. [Mr. Wagner] I'd like to refer you back to Exhibit Ten, R-10, which is the Notice of Violation itself, and ask you if I'm correct that this Violation is for failure to have an NPDES Permit?

A. It's for disturbing an area outside the NPDES Permit, sir.

Q. All right. This does not pertain, then, to a DSM Permit. It pertains to a NPDES Permit?

A. That's correct, sir.

Q. All right. You did not cite the operator for not having a DSM Permit?

A. No, sir, I did not.

Q. You only cited the operator for not having a NPDES Permit?

A. That's correct, sir."

(Tr. 42).

permanent regulatory program. See 30 CFR 942.10 (1984). In such circumstances, OSM was required to notify DSM of any violation of any requirement of SMCRA or "any permit condition" required by SMCRA determined to exist and allow DSM 10 days to take appropriate action to abate the violation. 30 U.S.C. § 1271(a)(1) (1982); see 30 CFR 843.12(a)(2). This notification shall be a written report of the violation "so that appropriate enforcement action can be taken by the State." 30 CFR 843.12(a)(2). If the State fails to take appropriate action or to show good cause for such failure, OSM "shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate." Id. We note parenthetically that, in the present case, the NOV was not issued by OSM pursuant to 30 CFR 843.12(a)(1) which provides for Federal enforcement of a state program for which OSM had assumed direct enforcement responsibility under section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), and 30 CFR Part 733. See Tr. 62.

In the present case, OSM afforded the State the 10-day notification of ELS's failure to reclaim the area east of Highway 25W in violation of its "NPDES permit condition." See Tr. 28. The State subsequently issued an NOV to ELS for failure to follow its approved NPDES permit. DSM terminated the NOV only when ELS had filed its application to amend the NPDES permit to include the area east of the road. OSM's NOV was issued after that termination and cited ELS for disturbing an area outside its approved NPDES permit area. However, the regulation which the NOV stated had been violated was "TN Regs. 0400-1-21-.02(1)," a Tennessee regulation applicable to coal tipples, processing plants, and support facilities not located within a mine permit area. <sup>4/</sup> The provisions of DSM regulation 0400-1-21-.02 introduced in evidence at the hearing (Exh. R-6) require any person who operates a coal tipple or processing plant which is not within the permit area for a specific mine to "obtain a permit in accordance with Regulation 0400-1-2 and Regulation 0400-1-14." However, testimony at the hearing indicated DSM permits were not required for tipples at the time of the NOV, which was prior to promulgation of revised regulations (Tr. 115-16; Exh. A-16). Indeed, inspector Sanders acknowledged the NOV was written for disturbing an area outside the existing NPDES permit and not for operating without a DSM permit (Tr. 42). See footnote 3, supra. Further, the inspector acknowledged at the hearing that the regulation cited in the NOV does not require an NPDES permit (Tr. 43-44). On the basis of the record established at the hearing, we are not surprised the Administrative Law Judge concluded he was "not sure whether or not the Applicant needed a surface mining permit" (Decision at 3). Hence, we conclude that the NOV failed to comply with the statutory requirement that it "set forth with reasonable specificity the nature of the violation and the remedial action required." 30 U.S.C. § 1271 (a)(5) (1982); see 30 CFR 843.12(b).

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<sup>4/</sup> OSM also cited sec. "502(2)" of SMCRA. There is no such statutory provision. However, sec. 502(a) of SMCRA, 30 U.S.C. § 1252(a) (1982), requires a person to refrain from conducting surface coal mining operations without a State permit under the initial regulatory program before approval of a State program. Where this case arises under the permanent regulatory program, the appropriate statutory provision to cite would have been sec. 506(a) of SMCRA, 30 U.S.C. § 1256(a) (1982).

OSM's NOV must be considered in the context in which it was issued. An inspection report referring to the May 1983 inspection by the State and OSM inspectors noted that ELS had failed to reclaim the area east of Highway 25W in accordance with its NPDES permit and that the State inspector had advised the violation would be referred "for appropriate action" (Exh. A-4). Indeed, the 10-day notification cited the violation of the "NPDES permit condition" (Exh. R-4), and the State issued an NOV citing the NPDES permit. In an inspection report, referring to the August 1983 inspection, the OSM inspector noted activity in the area and that the State had "confirmed the permittee had submitted plans to include that area as part of the tipple operation. However, the plans have not yet been approved" (Exh. A-1). The OSM inspector testified OSM's NOV was issued because of ELS's continued failure to abide by its NPDES permit (Tr. 42-6). Indeed, the NOV required either compliance with that permit by reclaiming the area or securing and implementing an "approved plan" (Exh. R-10). The October 1983 modification of the NOV was in part to provide additional time to ELS to secure State "approval of NPDES permit amendment" (Exh. R-11). In this context, the reference in the NOV to the Tennessee regulation requiring an operator of a coal tipple, processing plant, or other support facility to secure a permit is inherently contradictory. The NOV is therefore ambiguous with respect to whether the violation was conducting surface coal mining operations without a permit or failing to abide by a NPDES permit. This ambiguity is not resolved by the narrative description of the violation which merely states: "Operator has disturbed an area outside the approved NPDES permit area." The October 1983 hearing and Judge Torbett's January 1985 decision were concerned with both possible violations. See Tr. 12-13. In these circumstances, the ambiguity in the NOV was inherently prejudicial. Renfro Construction Co., 2 IBSMA 372, 87 I.D. 584 (1980). For this reason, we must affirm as modified Judge Torbett's January 1985 decision to vacate NOV 83-9-19-3. See Old Ben Coal Co., 2 IBSMA 38, 87 I.D. 119 (1980); cf. Island Creek Coal Co., 2 IBSMA 125, 87 I.D. 304 (1980) (distinguishing Old Ben).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

John H. Kelly  
Administrative Judge

We concur:

C. Randall Grant, Jr.  
Administrative Judge

R. W. Mullen  
Administrative Judge

